

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

BRIAN J. TISDELL,

Civil No. 10-3999 (JRT/LIB)

Plaintiff,

v.

**ORDER ADOPTING THE REPORT
AND RECOMMENDATION OF THE
MAGISTRATE JUDGE**

CLINTON JANOWIAK, ANNIE
PIKULA, MARSHA CLUEVER, JANE
DOE, and JOHN DOE,

Defendants.

Brian J. Tisdell, 31079 Spruce Street, Pequot Lakes, MN 56472, *pro se*,

This matter is before the Court on a response by pro se plaintiff, Brian J. Tisdell, to a Report and Recommendation by Magistrate Judge Leo I. Brisbois issued on September 29, 2010 regarding his application for leave to proceed *in forma pauperis* (“IFP”). The Court construes this response as an objection to the Report and Recommendation and simultaneously a new motion seeking permission to withdraw the complaint. *See* Minn. L. R. 72.2(a).

The Magistrate Judge recommends denying Tisdell’s IFP motion pursuant to 28 U.S.C. 1915(e)(2)(B)(ii) for failure to state a claim. Tisdell now requests the Court’s permission to withdraw his complaint and resubmit after the Crow Wing Sheriff’s department and the Federal Bureau of Investigations have had an opportunity to investigate his claims. For the reasons set forth below, the Court overrules the objection,

adopts the Report and Recommendation, dismisses the case without prejudice, and denies Tisdell's motion to withdraw as moot.

ANALYSIS

The standard of review applicable to an appeal of a Magistrate Judge's Order on nondispositive pretrial matters is extremely deferential. *Roble v. Celestica Corp.*, 627 F. Supp. 2d 1008, 1014 (D. Minn. 2007). The Court will reverse such an Order only if it is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); D. Minn. LR 72.2(a). The IFP statute describes several reasons for which a court can dismiss a complaint, including if the action or appeal is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. 1915(e)(2)(B).

Courts have interpreted this statute, absent clear language from Congress in the alternative, as giving the trial court the discretion to dismiss with or without prejudice. *Smith-Bey v. Hosp. Adm'r*, 841 F.2d 751, 756 (7th Cir. 1988) ("The absence of a specific limitation in the [IFP] statute, however, has been construed to mean that Congress intended to leave the decision to dismiss with or without prejudice in the district court's discretion."). The decision as to whether to dismiss with or without prejudice should turn on "whether the deficiencies in the complaint could be cured by amendment. If the allegations show that an arguable claim is 'indisputably absent,' then the district court should dismiss the case with prejudice . . ." *Id.* at 758.

Further, since a pro se plaintiff is owed a liberal reading of his pleadings to account for his lack of legal training, *see Estelle v. Gamble*, 429 U.S. 97, 106 (1976), the Eighth Circuit has generally approved of dismissals of IFP motions without prejudice. *See, e.g., Martin-Trigona v. Stewart*, 691 F.2d 856, 858 (8th Cir. 1982); *Navarro v. Chief of Police, Des Moines, Iowa*, 523 F.2d 214, 218, 128 n.3 (8th Cir. 1975) (finding the trial court abused its discretion by dismissing with prejudice when the pro se plaintiff's complaint failed to state a claim merely because it was "inartfully crafted").

The Court sees no error in the Magistrate Judge's recommendation that the IFP motion be dismissed for failure to state a claim and therefore overrules any objection and adopts the Report and Recommendation. This determination makes moot Tisdell's motion to withdraw his complaint. However, the Court notes that dismissal of Tisdell's complaint without prejudice, which the Court will order, will allow him the opportunity to resubmit a claim if he does in fact garner more evidence to support his claim.

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, the Court **OVERRULES** plaintiff's objection and **ADOPTS** the Report and Recommendation of the Magistrate Judge dated September 29, 2010 [Docket No. 3]. Accordingly, **IT IS HEREBY ORDERED** that:

1. Plaintiff's application for leave to proceed *in forma pauperis*, [Docket No. 2] is **DENIED**; and

2. The action is **DISMISSED without prejudice** pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

3. Plaintiff's motion to withdraw his complaint [Docket No. 4] is **DENIED as moot.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: December 27, 2010
at Minneapolis, Minnesota.

s/ John R. Tunheim
JOHN R. TUNHEIM
United States District Judge